Supreme Court, U. S.
FILED
APR 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-18

SOLOMON FISHER
and
MORRIS GOLDSMITH and SALLY GOLDSMITH,
Intervening Parties, Petitioners

v.

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, Special Agent,
Internal Revenue Service, *Respondents*

BRIEF FOR PETITIONERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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OPINION BELOW

The Opinion of the district court is reported at 352 F. Supp. 731 (E.D. Pa. 1972), and is printed as Appendix A to the Petition For Certiorari in this case. The Opinion of the court of appeals is reported at 500 F.2d 683 (3rd Cir. 1974), and is printed as Appendix B to the Petition For Certiorari.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1974. The Petition For Certiorari was filed on July 26, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment of the United States Constitution states:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . .

The pertinent portion of the Sixth Amendment of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

QUESTIONS PRESENTED

An accountant who handled bookkeeping for taxpayers made each year a written summary of taxpayers' checks and deposits. On or about August 5, 1971, the accountant gave taxpayers these summaries for the years 1969 and 1970. On August 17, 1971, taxpayers turned these same summaries over to their attorney, so that he could represent them in connection with a tax investigation by the Intelligence Division of the Internal Revenue Service. On December 1, 1971, a special agent of that Division served a summons on the attorney requiring him to produce these documents. The attorney refused on the ground that such a production would violate the Fifth Amendment rights of his clients. The taxpayers intervened in the enforcement proceeding and personally asserted their rights. Therefore, the questions presented are:

1. Does the Fifth Amendment protect a person from compelled production of self-incriminating documents which he holds in a personal capacity, consisting of summaries of his cancelled checks and deposit receipts compiled by his accountant?

2. If the answer to the above question is affirmative, is the Fifth Amendment right lost by the person's placing these documents in the custody of his counsel for use in representing the person in a criminal investigation?

STATEMENT OF THE CASE

In July, 1971, Alan Feldman, a special agent of the Intelligence Division of the Internal Revenue Service, contacted Morris and Sally Goldsmith ("the taxpayers"). He stated that he was a special agent investigating Mr. Goldsmith, and made an appointment with Mr. Goldsmith (30a-31a). At all times, up to and including the issuance of the summons on the taxpayers' attorney, the investigation of the taxpayers was conducted solely by the Intelligence Division of the Internal Revenue Service (24a, 34a).[1]

On August 3, 1971 the taxpayers retained Solomon Fisher to represent them (19a). Mr. Fisher is an attorney specializing in matters of income taxation (19a). Mr. Fisher thereafter informed Special Agent Feldman that he was representing the taxpayers and that the appointment of the taxpayers with Special Agent Feldman would not be kept (31a).

On or about August 4 or 5, 1971, taxpayer Morris Goldsmith informed his accountant, Harold Berson, that he desired to have records in the accountant's possession concerning himself and his wife examined by his attorney. The accountant thereupon delivered to the taxpayer "the balance of what we had" in the way of records concerning the taxpayers (51a, 53a-54a). On August 17, 1971, the taxpayers turned these records over to their attorney for his use in representing them, and the attorney retained the records in this capacity at all times thereafter (19a).

Special Agent Feldman first met with accountant Berson on October 22, 1971, and had no substantive discussion with the accountant prior to that time (31a-32a, 45a, 47a). On this occasion Special Agent Feldman served a summons on the accountant for documents concerning the taxpayer (26a, 47a, 71a-72a). The accountant explained that he had given what papers he had to the taxpayer at the taxpayer's request (45a, 51a-52a). The special agent asked the ac-

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1. The function of the Intelligence Division is limited to enforcement of criminal statutes (see page 10, *infra*).

countant to request the papers from the taxpayers (52a). The accountant testified that "I contacted Mr. Goldsmith and told him that I would like to get the papers back, that I was requested by the Government to bring them to their offices" (52a). On the return date of the summons, the accountant appeared as directed by the summons, but the special agent was not there (27a, 53a). Later that day the accountant advised the special agent in a telephone conversation that he did not have the papers (53a).

On December 1, 1971, the special agent called the taxpayers' attorney. The special agent related that the attorney told him that "he was going to return the records to Mr. Goldsmith and, as far as he was concerned, I could contact Mr. Goldsmith" (29a). The special agent testified that this information caused him to issue and serve the summons on the taxpayers' attorney on the very day of the telephone conversation (4a-5a, 29a-30a). The attorney appeared as directed by the summons, with the records in his possession that might fit the description in the summons, but refused to permit inspection of these records (19a).

The summons served on the taxpayers' attorney is the subject of this proceeding. It directs the taxpayers' attorney to produce for examination "Analysis of Receipts and Disbursements" for each of the taxpayers for the years 1969 and 1970(4a).[2] The documents in question are simply listings of cancelled checks and deposits for 1969 and 1970, taken directly and entirely from the cancelled checks and deposit receipts of the taxpayers (50a, 61a). These notations were written by the accountant, but generally this kind of write-up is done by taxpayers (48a, 55a, 56a). The accountant testified that the listings represented a bookkeeping rather than accounting function, and that he did not consider them to be accountant's work papers (50a, 55a, 56a, 62a).

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2. There is an additional category of documents identified in the summons, but the Government did not seek enforcement of the summons as to these documents (30a, 32a).

The accountant had performed the function of summarizing the taxpayers' cancelled checks and deposits for at least twenty-five years (50a, 54a). He regularly and consistently turned these summaries over to the taxpayers for their permanent possession after a period of not more than three or four years from the time of preparation (51a, 55a-56a, 57a, 61a, 65a, 66a, 68a). At the time the taxpayers requested records which were in the possession of the accountant, the summaries of cancelled checks and deposits for years prior to the last several years had already been given to the taxpayers (56a).

The accountant regarded the summaries of cancelled checks and deposits as belonging to the taxpayers, and the taxpayers shared this understanding (55a, 57a, 65a).

The government brought the present action under 26 U.S.C. §7402(b) and 7604(a) (1964) to enforce the summons served on the taxpayers' attorney (6a). The taxpayers intervened by order of the District Court, and asserted that compelled production of the records would violate their rights under the Fourth, Fifth and Sixth Amendments (15a-16a, 23a, 73a). The District Court held an evidentiary hearing, and concluded that the records were accountant's work papers, owned by the accountant, and that ownership by the accountant negated taxpayers' Fifth Amendment claim (Petition For Certiorari, A5-A7). The District Court ordered enforcement of the summons. The Court of Appeals, in an *en banc* opinion,[3] affirmed the District Court's Order, with one judge dissenting on the Fifth Amendment issue (Petition For Certiorari, A8-A44).

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3. One Judge (Judge Adams) did not participate in the decision.

SUMMARY OF ARGUMENT

The present case involves a summons served on an attorney pursuant to an investigation of his clients by the Intelligence Division of the Internal Revenue Service. The Intelligence Division's function is limited by regulation to criminal matters. The summons sought summaries prepared by taxpayers' accountant of the cancelled checks and deposit receipts of the taxpayers for the years 1969 and 1970. The accountant had prepared such summaries for each year over a twenty-five year period, and regularly gave the summaries to taxpayers after keeping them for several years.

Approximately two weeks after receiving the summaries for 1969 and 1970, taxpayers delivered these summaries, as well as other records, to their attorney, for his use in representing them in the criminal investigation. The summons on the attorney was served several months later, immediately after the attorney informed the special agent that he was about to return the records to his clients.

There are two legal questions. Would the taxpayers have been protected from compulsory production of the summaries if they had retained the summaries themselves and, if so, did they lose this protection by delivering the summaries to their attorney.

The privilege against self-incrimination protects an individual from being compelled to produce private papers which may incriminate him. *Boyd v. United States*, 116 U.S. 616 (1886). The privilege may be asserted by one who has possession of incriminating papers "in a personal capacity". *United States v. White*, 322 U.S. 694 (1944); *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967). Ownership is not a condition for Fifth Amendment protection. *Couch v. United States*, 409 U.S. 322, (1973).

Taxpayers' possession of the summaries (prior to turning them over to their attorney) was in a personal capacity. The summaries concerned the taxpayers own

financial affairs, which they conducted as individuals, and the summaries were held personally, rather than as a representative or agent. Thus, taxpayers could not have been compelled to produce these summaries as long as the summaries remained in their actual possession. *United States v. Kasmir*, 499 F.2d 444, 450-452 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 27, 1975) (No. 74-611) (Petition For Certiorari at 11A-13A); *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967). Moreover, to the extent it may be relevant, taxpayers' possession of the summaries was also "rightful", as it accorded with the possession of this kind of record over twenty-five years, and, at the very least, was fully agreed to by the accountant. See *United States v. Kasmir, supra; United States v. Cohen, supra* at 469-470.

The taxpayers did not lose their Fifth Amendment privilege by delivering the summaries to their attorney for his use in representing them in the Intelligence Division's investigation. Taxpayers had the right to be represented by retained counsel in the investigation. *Escobedo v. Illinois*, 378 U.S. 478 (1964); and see *Maness v. Myers*, 43 U.S.L.W. 4143, 4150 (U.S. Jan. 15, 1975) (concurring opinion of Mr. Justice Stewart). This right is publicly recognized by the Internal Revenue Service, and the Service by its rules requires all special agents to inform taxpayers under investigation of their right to counsel. The Fifth Amendment privilege cannot be unwittingly forfeited by the exercise of the right to counsel, which is the very means by which the Fifth Amendment is implemented. *Maness v. Myers, supra* at 4149. Nor can the exercise of the right to retained counsel be penalized by imposing forfeiture of the Fifth Amendment privilege on it. *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniform Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Spevack v. Klein*, 383 U.S. 511 (1967).

The delivery of the summaries by the taxpayers to their attorney does not adversely affect their Fifth Amendment privilege for the additional reason that it did not deprive them of the requisite possession to assert the privilege. The attorney stood in the shoes of the taxpayers in representing them in the Intelligence Division investigation, and the taxpayers had a justifiable expectation that the information in the summaries would be treated confidentially by their attorney. *United States v. Kasmir, supra; United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963); 8 Wigmore, *Evidence* §2307 (McNaughton Rev. 1961); and see *Couch v. United States, supra* at 350. Thus, the attorney's holding the summaries for the taxpayers constituted constructive possession by the taxpayers for purposes of the privilege against self-incrimination.

ARGUMENT

A. The Taxpayers Could Not Have Been Compelled to Produce the Records Identified in the IRS Summons Had They Retained Possession of Those Records.

1. TAXPAYERS HELD THE RECORDS IN QUESTION, CONCERNING THEIR PERSONAL FINANCIAL AFFAIRS, IN A PERSONAL CAPACITY BEFORE DELIVERING THEM TO THEIR ATTORNEY FOR THE PURPOSE OF OBTAINING LEGAL ADVICE.

The records identified by the Intelligence Division of the Internal Revenue Service in the summons served on attorney Fisher concern solely the personal financial affairs of taxpayers. They consist of listings of checks and deposit receipts of the taxpayers for the years 1969 and 1970. Such summaries are generally prepared by taxpayers themselves rather than by accountants. In the twenty-five years during which accountant Berson performed this bookkeeping for the taxpayers, he regularly gave these summaries to the taxpayers within three or four years of the time they were prepared. Both the accountant and the taxpayers regarded the summaries as belonging to the taxpayers (see pages 4-5, *supra*).

In the beginning of August, 1971, the taxpayers requested financial records in their accountant's possession, which included the summaries for 1969 and 1970. The accountant willingly gave these summaries to the taxpayers, as he had willingly given them the summaries for the previous years. Thus, possession by the taxpayers was in a personal capacity and, to the extent it is relevant, their possession was "rightful".

Taxpayer Morris Goldsmith's request for the records concerning himself and his wife which their accountant had not yet given to them was a predictable and appropriate response to the knowledge that he was the subject of a criminal investigation by the Internal Revenue Service. So, too, was his retention of counsel. A special agent is required

by Internal Revenue Service rules to advise a taxpayer at their initial meeting that the taxpayer has the right to seek the assistance of an attorney. IRS News Release IR-949, Nov. 26, 1968; 1968 CCH Stand. Fed. Tax Rep. ¶946. Approximately two weeks after these additional records were delivered to the taxpayers, they turned the records over to their attorney for the purpose of obtaining legal advice.

The present case involves an investigation of alleged or suspected criminal violations. The investigation was at all times conducted solely by the Intelligence Division of the Internal Revenue Service (24a, 32a-34a). The Court has recognized that the functions of the various divisions of the Internal Revenue Service are governed by regulations issued by the Secretary of the Treasury. See *Donaldson v. United States*, 400 U.S. at 517, 534 (1971). The regulations effective at the time that the summons was issued in this case limited the responsibility and function of the Intelligence Division to criminal matters.[4] The Internal Revenue Service is bound by these regulations, and indeed has not disputed their accuracy. See *United States v. Nixon*, 418

4. The regulations define the function of the Intelligence Division as follows:

> The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U.S. attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases. [36 Fed. Reg. 849 et seq. (1971)].

U.S. 683 (1974); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) and *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970).

The accountant gave the records sought in this case to the taxpayers seven weeks before the special agent served a summons on the accountant, and almost four months before issuance and service of the summons which is the subject of this case (see pages 3-4, *supra*). The courts have stated that the rights of the taxpayers in an enforcement case become fixed when the summons is served. *Couch v. United States*, 409 U.S. 322, 329, n.9 (1973); *United States v. Kasmir*, 499 F.2d 444, 450-451 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 27, 1975) (No. 74-611), Petition For Certiorari at 12A-13A; *United States v. Zakutansky*, 410 F.2d 68, 72 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021. Thus, at the relevant time in this case, taxpayers' attorney was in possession of the records for the purpose of giving legal advice, the records having been delivered to him by taxpayers following actual possession by them in a personal capacity for approximately two weeks.

2. *A Private Citizen Who Holds Incriminating Records Concerning His Personal Financial Affairs Cannot Be Compelled to Produce Those Records.*

Governmental compulsion against a citizen to produce private papers which may incriminate him is a violation of fundamental constitutional rights. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court held that compelled production of an invoice in a forfeiture proceeding violated the Fourth and Fifth Amendment rights of the owner and possessor of the document. In *Boyd*, this Court recalled the deep historic roots of the right of private citizens not to disclose private papers to government agents. In discussing Lord Camden's Opinion in *Entick v. Carrington*, 19 Howell, St. Tr., 1029, the Court stated (116 U.S. at 630):

> The principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case

then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where the right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

The holding of *Boyd* that compulsory production of the invoice would violate petitioner's Fifth Amendment rights has never been questioned by the Court, and its continued vitality has been acknowledged on numerous occasions. See, *e.g.*, *Bellis v. United States*, 417 U.S. 85, 87-88 (1974); *United States v. Calandra*, 414 U.S. 338, 346 (1974); *United States v. Dionsio*, 410 U.S. 1, 11 (1973); *Schmerber v. California*, 384 U.S. 757, 763-64 (1966). Justice Brandeis characterized *Boyd* as "a case that will be remembered as long as civil liberty lives in the United States." *Olmstead v. United States*, 227 U.S. 438, 474 (1928) (dissenting opinion).

Thus, historically, the right of an individual not to be a witness against himself has included the right not to produce incriminatory papers. As stated by McCormick:

> The privilege, as it emerged in England and as it was expressed in our constitutions was against being compelled to "be a witness" or "to give evidence" against oneself. Compulsion to be a witness or to give evidence was compulsion to do those things which a witness would, by traditional judicial process be required to do. These were only (1) to give oral testimony as evidence of facts stated, and (2) to produce, in court, under judicial order, documents and other objects. (Footnotes omitted) [McCormick, *Evidence*, 263-264 (1954)]

Two basic considerations compel the conclusion that private papers are within the Fifth Amendment's protection. The first is the "testimonial" or "communicative" nature of the documents themselves: they have precisely the same character as the testimony that would be compelled if the citizen were required by compulsory process to take the stand. Thus, in *United States v. Dionsio*, 410 U.S. 1 (1973), this Court distinguished for Fifth Amendment purposes between the physical characteristics of a defendant and a defendant's private books and records in the following manner:

> But *Boyd* dealt with the compulsory production of private books and records, *testimonial sources*, a circumstance in which the "Fourth and Fifth Amendments run almost into each other". (Emphasis added) (410 U.S. at 7, n. 6).

And in *Warden v. Hayden*, 387 U.S. 297 (1967), the Court stated:

> The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. (307 U.S. at 302-303).

The other basis for Fifth Amendment protection is the testimonial communication inherent in the very act of producing documents. To produce them in response to the demand is to identify and authenticate them. Thus, in *Schmerber v. California*, 384 U.S. 757, 763-764 (1966), the Court stated:

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers.

See also, *Bellis v. United States*, 417 U.S. 85, 88 (1974); *Couch v. United States*, 409 U.S. 322, 327 (1973); *Gilbert v. California*, 388 U.S. 263, 266-267 (1967); *Curcio v. United States*, 354 U.S. 118, 125 (1957); and 8 Wigmore, *Evidence* §2264, at 379-380 (McNaughton Rev. 1961).

The fact that a third party may be able to identify or authenticate the documents at a subsequent legal proceeding does not render the identification and authentication of the party who is required to produce the documents any less self-incriminating. The Fifth Amendment protects against self-incriminating communication, and is not limited to communications at the time of a criminal proceeding. The scope of the privilege is summarized in *Maness v. Meyers*, 43 U.S.L.W. 4143, 4147 (U.S. Jan. 15, 1975):

> This Court has always broadly construed its [Fifth Amendment's] protections to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920). The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The holding in *Maness v. Meyers* is also instructive:

> We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination *in any proceeding embracing the power to compel testimony*. (Emphasis added) (41 U.S. L.W. at 4149).

Even if it be assumed that taxpayers did not "own" the listings prepared by the accountant from taxpayers' records and delivered to taxpayers at their request, there is no question that taxpayers possessed the documents in a personal capacity. This Court has explicitly rejected earlier precedents conditioning constitutional rights on property concepts. *Katz v. United States*, 389 U.S. 347, 352-353 (1967); *Warden v. Hayden*, 387 U.S. 294, 304-306 (1967); *Silverman v. United States*, 365 U.S. 505, 511 (1961); *Jones v. United States*, 362 U.S. 257, 266-267 (1960).

In *Couch v. United States*, 409 U.S. 322 (1973), the Court pointed out that possession of documents, not ownership, bears the most significant relationship to the Fifth Amendment's prohibition against extortion of information from the accused. Although *Couch* involved a taxpayer who had neither actual nor constructive possession of the records sought, the Court referred to the case of possession without ownership, emphasizing the final clause from its earlier statement in *United States v. White*, 322 U.S. 694, 699 (1944):

> The papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity*. (Emphasis in original) (409 U.S. at 330, n.10).

The statement from *United States v. White*, cited in *Couch*, reflects holdings of the Court that documents of corporations, labor unions, partnerships, and other state created or collective entities are not immune from production when held by an individual (*e.g.*, a corporate officer) in his *representative* capacity. See *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White, supra*; *Wilson v. United States*, 221 U.S. 361 (1911). Indisputably,

the records here in question were held by taxpayers in a personal capacity before they delivered them to their attorney.

Of the many Internal Revenue Service summons cases that have been decided by the lower courts, this Court singled out *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967), for approval in its opinion in *Couch v. United States*, *supra*. In *Cohen*, the Ninth Circuit upheld the taxpayer's assertion of Fifth Amendment privilege not to produce work papers prepared by his accountant on the basis of information supplied by the taxpayer. The Ninth Circuit expressly rejected the government's contention that the taxpayer's ownership of the documents was a condition of Fifth Amendment protection.

> As the government recognizes, the rule it suggests would make ownership of subpoenaed documents virtually essential to a claim of privilege, for ordinarily only the owner will be able to assert a right to possession superior to all others. But it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit. The "cruel trilemma" of perjury, contempt, or self-incrimination, of which the Court spoke in Murphy v. Waterfront Comm'n, faces the individual whenever the government seeks to compel him to produce papers in his possession, for he must then either falsify, accept punishment for contempt, or yield. Lack of title does not free him from this choice. Possession of potentially incriminating documents is thus the necessary and sufficient condition of the privilege, for the compelled production, identification, and authentication of incriminating materials by the possessor will incriminate him, whether or not the documents are his. (Footnotes omitted) (388 F.2d at 468).

In *Couch*, the Court noted that conditioning Fifth Amendment rights on ownership placed "unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections" (409 U.S. at 331). The present case confirms this observation. The records sought are simply listings of checks and deposits, which most taxpayers do for themselves (see page 4, *supra*). If taxpayers had performed this function themselves, or if they had had an employee do it, or even if an accountant had done it at the taxpayers' home or business, there would be no dispute about ownership. It is difficult to conceive of a Fifth Amendment policy which is served by permitting a different result simply because the accountant performed this service at his own office and kept the records there for a limited time before delivering them to the possession of his principal.

3. *Had Taxpayers Not Delivered the Summaries to Their Attorney, They Could Not Have Been Compelled to Produce Them Without Violation of Their Fifth Amendment Privilege.*

The summaries in question were in taxpayers' possession in a personal capacity; they were given to the taxpayers willingly by their accountant, who considered the summaries to be theirs and who regularly over twenty-five years had given the summaries to taxpayers; and they concerned taxpayers private financial affairs. Had the taxpayers continued to hold these documents themselves, or if the summons had been served on taxpayers before the summaries were delivered to their attorney, the taxpayers could have claimed the Fifth Amendment privilege.

The records sought in this case reflect directly and solely the financial transactions of taxpayers, each of whom conducted a business as a sole proprietor (67a, 69a). There can be no question that the records sought constitute the kind of papers for which private citizens can assert Fifth Amendment protection. In *Bellis v. United States*, 417 U.S. 85, 87-88 (1974), the Court stated:

> The privilege applies to the business records of the sole proprietor or sole practitioner as well as to per-

sonal documents containing more intimate information about the individual's private life. *Boyd v. United States, supra, Couch v. United States*, 409 U.S. 322 (1973); *Hill v. Philpott*, 445 F.2d 144 (CA7), cert. denied, 404 U.S. 991 (1971); *Stuart v. United States*, 416 F.2d 459, 462 (CA5 1969).

The fact that taxpayers' hand did not transcribe the items subpoenaed certainly does not impair their claim of Fifth Amendment protection. "Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." *Wilson v. United States*, 221 U.S. 361, 378. Significantly, the document sought in *Boyd* was also a business record (an invoice) which had been prepared by a third party. *Boyd v. United States*, 116 U.S. at 619.

At no point has the government contended that the records sought are required business records within the doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948). Even if it were not now precluded from doing so on appeal [see *Spevack v. Klein*, 385 U.S. 511, 517-519 (1967)], it is plain that the records here at issue are in no sense "public" documents. See *Marchetti v. United States*, 390 U.S. 39, 55-57 (1968); *Grosso v. United States*, 309 U.S. 62, 68 (1968); *Haynes v. United States*, 390 U.S. 85, 98-99 (1968); *Leary v. United States*, 395 U.S. 6, 12-13 (1969); *Hill v. Philpott*, 445 F.2d 144, 146, n.2 (7th Cir. 1971).

The majority opinion of the Court of Appeals in this case did not decide whether the taxpayers could have asserted Fifth Amendment rights if they had not delivered the summaries to their attorney and the summons had been served on them. Instead, that Court pointed to the two weeks during which the taxpayers had actual possession of the summaries, and termed this possession "fleeting" and "transitory" and therefore insufficient to confer the degree of privacy which that Court felt was required to support a claim of Fifth Amendment privilege. *United States v. Fisher*, 500 F.2d 683, 690-692 (3d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 27, 1975) (No. 74-18), Petition For Certiorari at A20-A24.[5]

The Court of Appeals emphasized privacy to the exclusion of the other values which are more basic to the Fifth Amendment. See *Tehan v. Scott*, 382 U.S. 406, 415-416 (1966); *United States v. Cohen, supra* at 471. Nonetheless, to the extent privacy is a concern of the Fifth Amendment, that value would be undermined by excluding personal financial records from the area of Fifth Amendment protection simply because they were prepared by an agent and held temporarily by him. "Financial transactions can reveal much about a person's activities, associations and beliefs." *California Bankers Association v. Shultz*, 416 U.S. 21 78-79 (1974) (concurring opinion of Mr. Justice Powell). The Ninth Circuit in *United States v. Cohen* recognized that the private nature of personal financial records is not altered by the fact that they are prepared by an accountant. That Court reasoned (388 F.2d at 471-472):

> Though prepared by Berke [the accountant] for use by him in the performance of his work, the work papers were scarcely public documents. They embody countless items of information relating to Cohen's purely personal affairs, including itemizations and summaries of data prepared directly from Cohen's bank statements, cancelled checks, and similar records. They were plainly intended for no eyes but those Cohen might designate. To pretend that such papers did not in substance reflect matter personal and private to Cohen, and to treat such papers as a

5. The Court of Appeals' holding is in direct conflict with the holding of the Court of Appeals for the Fifth Circuit in *United States v. Kasmir, supra*. In *Kasmir*, where the possession by the taxpayer was only momentary, the Fifth Circuit held that the taxpayer "was in the position to assert his Fifth Amendment privilege, if the summons had then been served", and that his rights were not diminished by his delivering the records to his attorney (499 F.2d at 451-455).

source of information "independent" of Cohen, would be to condone the very "shifts and subterfuges" which the government calls upon us to condemn.

Some Internal Revenue Service summons cases have applied the criteria of "rightful" possession to the assertion of Fifth Amendment rights. See *United States v. Zakutansky*, 401 F.2d 68 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021; *United States v. Foster, Lewis, Langley & Onion*, 65-1 U.S. Tax Cases ¶9418 (W.D. Tex. 1964); *Application of House*, 144 F.Supp. 95 (N.D. Cal. S.D. 1956); *Contra, Cohen v. United States*, 388 F.2d at 469-470; *In re Grant*, 198 F.708, 709 (S.D.N.Y. 1912), *aff'd* 227 U.S. 74 (1913) (L. Hand, J.). Under this criteria, a person holding papers as an agent of another [see *United States v. Egenberg*, 443 F.2d 512 (3d Cir. 1971)], or by theft, or whose possession constitutes an unlawful conversion [see *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964)] cannot assert Fifth Amendment protection from compelled production of those papers.[6]

Even assuming that "rightful" possession is a valid condition of Fifth Amendment rights, it cannot be said in the present case that taxpayers' possession was wrongful. Taxpayers had regularly received these summaries for their indefinite possession over their twenty-five year relationship with their accountant, and both the accountant and

6. Application of a requirement of "rightful" possession to an individual being investigated, as in this case, solely for suspected criminal violations, when the records are sought as part of that investigation, appears inconsistent with the history as well as the values of the Fifth Amendment privilege (see pages 12-14, *supra*). Certainly personal records could not be compelled from the individual as part of pre-trial discovery in a criminal case, even if the records were not in his "rightful" possession. The Fifth Amendment is not limited to formal criminal proceedings (see pages 14-15, *supra*), and even certain limitations which have been placed on the Fifth Amendment privilege (having no bearing on the present case) have not applied to criminal investigations. See *California v. Byers*, 402 U.S. 424 (1971); *Marchetti v. United States, supra; Grosso v. United States, supra; Haynes v. United States, supra; Leary v. United States, supra*.

taxpayers regarded the summaries as belonging to the taxpayers. Possession of summaries by taxpayers was the norm, and at the very least it was fully agreed to by the accountant. The accountant's inquiring of the taxpayers whether they could return the summaries, solely as an accommodation to the special agent, cannot be said to render taxpayers' possession unlawful.

Cohen v. United States, supra, although rejecting "rightful" possession as a condition of Fifth Amendment rights, assumed such a requirement *arguendo* and ruled that it was satisfied on facts very similar to those in the present case:

> In any event, Cohen's [taxpayer's] possession cannot fairly be characterized as wrongful. Berke [the accountant] testified without contradiction that he considered all papers relating to his client's affairs to be theirs to command, and that it had been his invariable practice to deliver such papers to the client whenever requested. When Beason [special agent] asked Berke to request the return of the papers, Berke simply reported the fact to Cohen, saying "Mr. Beason has asked me to ask you to return the files that you took from our office". This would appear to have been no more than a transmittal by Berke to Cohen of Beason's request; at least it was scarcely a clear demand by Berke that Cohen submit to Berke's superior right. (Footnote omitted) (388 F.2d at 470).

Accord, *United States v. Foster, Lewis, Langley & Onion*, U.S. Tax Cases, 65-1, ¶9418 (W.D. Tex. 1964), *Application of House*, 144 F.Supp. 95 (N.D. Cal. S.D. 1956).

The Internal Revenue Service, by its own regulations and by its conduct in this case, appears to acknowledge that the taxpayers could not have been compelled to produce the records which it seeks. The Internal Revenue Service requires all special agents to give the following statement at the outset of their first meeting with the taxpayer:

> In connection with my investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions *or to submit any information if such answers or information might tend to incriminate you in any way*. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken.
>
> I advise you further that you may, if you wish, seek the assistance of an attorney before responding. (Emphasis added) (CCH, Internal Revenue Manual, Part IX — Intelligence, §9384.2).

This position and policy statement is also contained in an official news release of IRS. IRS News Release, IR-949, Nov. 26, 1968; 1968 CCH Fed. Tax Rep. ¶6946. Fairness and due process in law enforcement require that the government be bound by its public statements of position and policy. *United States v. Nixon*, 418 U.S. 683, 694-696 (1974); *Service v. Dulles*, 354 U.S. 363 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969). Moreover, Special Agent Feldman's haste to serve the summons when he learned that the attorney was about to return the records to the taxpayers (see page 4, *supra*) demonstrates the recognition of the Internal Revenue Service that it could not constitutionally compel taxpayers to produce the records.

The uncontradicted evidence shows that taxpayers had possession of the records in a personal capacity and, to the extent it is relevant, that their possession was "rightful". Thus, if taxpayers had continued in possession of the records, they could have successfully asserted Fifth Amendment protection from compelled production of those records.

B. The Taxpayers Did Not Forfeit Their Fifth Amendment Rights by Turning Over the Summaries to Their Attorney to Obtain Legal Advice in Connection with the Criminal Investigation Being Made of Them.

1. *Taxpayers Exercising Their Right to Retain Counsel in a Criminal Investigation Cannot Thereby Be Deprived of Their Fifth Amendment Privilege.*

Taxpayer Morris Goldsmith was under investigation for suspected violation of criminal laws. As the subject of a criminal investigation, called upon to give evidence, he had the right under the Fifth and Sixth Amendment to employ an attorney to represent him and give him legal advice. See *Escobedo v. Illinois*, 378 U.S. 478 (1964).[7] Moreover, the Internal Revenue Service, by its publicly stated rules, recognizes this right, and its publicly stated position and policy is binding on it (see pages 21-22, *supra*).

The taxpayers' turning over financial records to their attorney, in connection with the investigation of them by the Intelligence Division, is a natural and predictable incident of the attorney-client relationship. Thus, the difference between possession of the records by taxpayers and possession by their attorney, on which the lower court and the government place great reliance, is the direct result of the taxpayers exercise of their right to counsel. If taxpayers lost

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7. Petitioners do not understand *Kirby v. Illinois*, 406 U.S. 682 (1972), to hold otherwise. In *Kirby* the Court emphasized that the right against self-incrimination was "in no way implicated" (406 U.S. at 687). Moreover, *Kirby* involved right to *appointed* counsel, which is by no means co-extensive with the right to retained counsel. A "due process right to retained counsel in civil proceedings" has been recognized by two members of the Court. *Maness v. Myers*, 43 U.S.L.W. 4143, 4150 (U.S. Jan. 15, 1975) (concurring opinion of Mr. Justice Stewart). This recognition indicates the larger scope of the right to retained counsel, which must at the very least apply to the subject of a criminal investigation who is asked to provide information to the government authority investigating him.

their Fifth Amendment rights because they delivered records in their actual possession to their attorney, then this forfeiture would be a penalty for the exercise of their right to counsel. Such a penalty on the exercise of a constitutional right is impermissible. *Spevack v. Klein*, 385 U.S. 511 (1967); *Uniform Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968). The Court has struck down a number of far less serious burdens on the exercise of constitutional rights. See *Miami-Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Speiser v. Randall*, 357 U.S. 513 (1958); and *Murdock v. Pennsylvania*, 319 U.S. 103 (1943).

The playing off of the right to counsel against the Fifth Amendment privilege is particularly indefensible in view of the complementary and close relation between these rights. In *Maness v. Meyers*, *supra*, the Court observed that the advice of an attorney is the means by which the Fifth Amendment privilege is implemented, and that

> A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. (43 U.S.L.W. at 4149).

See also *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). Thus, any penalty or burden on the right to counsel in a criminal investigation also contravenes the privilege itself.

An individual may not be put to a "Hobson's choice" between forfeiting his privilege against self-incrimination or his right to counsel. See *Gardner v. Broderick*, *supra* at 277. Even less can he be held to *unwittingly* forfeit the privilege simply by exercising his right to counsel, particularly where the investigating agency recognizes and reminds the individual of his right to counsel, and would benefit from the forfeiture.

The record in this case demonstrates that the Internal Revenue Service intentionally sought to use taxpayers' consultation with counsel as a means of depriving taxpayers of their Fifth Amendment privilege. The summons was issued and served on the attorney later on the same day that he advised the special agent that he was about to return the records to the taxpayers. The special agent testified it was this statement by the attorney that caused him to immediately issue and serve the summons (29a-30a). The special agent was apparently aware of the statement in the Intelligence section of the Internal Revenue Manual that taxpayers cannot be compelled to submit information which might tend to incriminate them (see pages 21-22, *supra*), and therefore acted to prevent the attorney from returning the records to his clients. Constitutional rights cannot be denied on the basis of such gamesmanship.

2. *TAXPAYERS HAD CONSTRUCTIVE POSSESSION OF RECORDS IN THE CUSTODY OF THEIR ATTORNEY WHICH THEY DELIVERED TO HIM TO OBTAIN LEGAL ADVICE IN CONNECTION WITH A CRIMINAL INVESTIGATION BEING MADE OF THEM.*

The delivery of the summaries by the taxpayers to their attorney does not adversly affect their Fifth Amendment privilege for the additional reason that it did not deprive them of the requisite possession to assert the privilege. This Court recognized in *Couch v. United States*, *supra*, that constructive possession of documents can enable an individual to successfully assert Fifth Amendment protection from compelled disclosure. 409 U.S. at 333. The Court further indicated that justifiable expectation of privacy by the person asserting the privilege was an important consideration in determining whether there was constructive possession by him.

The summaries in question were turned over by taxpayers to their attorney for the attorney's use in representing and furnishing legal advice to them. At the time the

taxpayers were under investigation by the Intelligence Division for suspected violation of criminal laws (see page 3, *supra*).

If the principle of constructive possession has any meaning whatsoever, it necessarily must apply to an attorney representing a client who is under criminal investigation. This point was asserted by the Ninth Circuit in *United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963):

> The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other "third party", nor "agent", nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of a matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry.

Accord, *United States v. Kasmir*, *supra* at 452; *Colton v. United States*, 306 F.2d 633, 639 (2nd Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); and see *Brody v. United States*, 243 F.2d 378, 387 (1st Cir. 1957), *cert. denied*, 354 U.S. 923; 8 Wigmore, *Evidence* §2307 (McNaughton Rev. 1961); *Couch v. United States*, *supra* at 350 (dissenting opinion of Mr. Justice Marshall).[8] It is significant that this Court

8. The Government relies on *United States v. White*, 487 F.2d 1335 (5th Cir. 1973), *cert. denied*, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974); *Bouscher v. United States*, 316 U.S. 451 (8th Cir. 1963); *In Re Fahey*, 300 F.2d 383 (6th Cir. 1961). However, in none of these cases did the taxpayer have possession of the records at any time.

in *Couch* referred to *United States v. Judson*, *supra*, as a case "where possession and ownership conjoined" (409 U.S. at 330), although actual possession in that case as in this rested with the attorney and not the taxpayer.

There can be no question that an individual who gives documents to an attorney representing him in a criminal matter has a justifiable expectation that the documents will be held in confidence. The attorney's obligation not to disclose information of a confidential nature to third parties is a tenet of legal ethics. *ABA Code of Professional Responsibility, Ethical Consideration* 4-4, states in part:

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

Attorney Fisher stood in the shoes of his clients in representing them in the investigation by the Intelligence Division, and he was bound by the attorney-client relationship not to disclose to third parties the summaries given to him by the taxpayers. Attorney Fisher received the summaries directly from his clients. For purposes of the Fifth Amendment privilege, the taxpayers had constructive possession of the summaries when their attorney was served with the summons to produce them.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed, and the case remanded to the Court of Appeals for the purpose of directing the District Court to deny the Petition To Enforce Internal Revenue Summons.

Respectfully submitted,

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